



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



FILE: [REDACTED] Office: Atlanta

Date: APR 19 2000

IN RE: Applicant: [REDACTED]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(h) and (i) of the Immigration and Nationality Act, 8 U.S.C. 1182(h) and (i)

IN BEHALF OF APPLICANT:



Public Body

Identifying and
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Terrance M. O'Reilly, Director
Administrative Appeals Office

DISCUSSION: The dual waiver application was denied by the District Director, Atlanta, Georgia, and is now before the Associate Commissioner for Examinations on appeal. The appeals will be dismissed.

The applicant is a native and citizen of Nigeria who was present in the United States without a lawful admission or parole in July 1987. He was found to be inadmissible to the United States under §§ 212(a)(2)(B) and 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(2)(B) and 1182(a)(6)(C)(i), for having been convicted of multiple crimes and for having entered the United States by fraud or misrepresentation. The applicant married a United States citizen in June 1995 and is the beneficiary of an approved immediate relative visa petition. He seeks a waiver of this permanent bar to admission as provided under §§ 212(h) and (i) of the Act, 8 U.S.C. 1182(h) and (i), to reside with his spouse in the United States.

The district director determined that the applicant had been convicted of an aggravated felony and the Act does not provide for a waiver of the ground of deportability based upon a conviction for an aggravated felony. The district director denied the application because the request for a waiver of grounds of excludability (inadmissibility) was not pertinent.

On appeal, counsel argues that the term "aggravated felony" was not defined when the applicant committed the offense in 1991. Counsel states that the Service cannot retroactively apply the definition of that term. Counsel further states that the applicant's crime is a fraud crime and thus he is eligible for a waiver.

Section 212(a)(2)(B) of the Act provides that:

Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the convictions was in a single trial or whether the offenses arose from a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were 5 years or more is inadmissible.

Section 212(a)(6)(C)(i) of the Act provides that:

Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Sections 212(a)(2)(B), 212(a)(6)(C)(i), 212(h) and 212(i) of the Act were amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub L. 104-208, 110 Stat. 3009. In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. See Matter of Soriano, Interim Decision 3289 (BIA, A.G. 1996).

If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statute more generous, the application must be considered by more generous terms. Matter of George and Lopez-Alvarez, 11 I&N Dec. 419 (BIA 1965); Matter of Leveque, 12 I&N Dec. 633 (BIA 1968).

Section 212(h) of the Act provides that the Attorney General may, in his discretion, waive application of subparagraph 212(a)(2)(B)...if-

(1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-

(i) the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in her discretion, and pursuant to such terms, conditions and procedures as he or she may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or for adjustment of status.

Section 212(h) of the Act specifically precludes several categories of aliens from eligibility for its benefits. These include:

(1) aliens who have been convicted of (or who have admitted committing acts that constitute) murder or criminal acts involving torture.

(2) lawful permanent residents if either since the date of such admission: (a) they have been convicted of an aggravated felony, or (b) they have not lawfully resided continuously in the United States for a period of at least 7 years immediately preceding the date of initiation of proceedings to remove them from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

Section 212(i) of the Act provides that:

(1) The Attorney General may, in the discretion of the Attorney General, waive application of clause (i) of subsection (a)(6)(C) in the case of an immigrant who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

The applicant has never been a lawful permanent resident; therefore, he is not precluded from applying for the § 212(h) and (i) waivers. The applicant requires both a § 212(h) and § 212(i) waiver in this matter. Although both §§ 212(h) and 212(i) now require a showing of extreme hardship to a qualifying relative, the application will be adjudicated first according to the standards established for § 212(i) waivers. The criteria are more stringent for § 212(i) waivers than those set forth in § 212(h) waiver proceedings because a U.S. citizen or resident alien parent no longer can file an application and extreme hardship to a child is no longer a consideration.

The record reflects the following regarding the applicant:

(1) On April 15, 1991, the applicant pleaded guilty to the offense of Financial Transaction Card Theft, and he was sentenced to three year's confinement with the provision that the sentence be served on probation.

(2) On May 25, 1994, the applicant pleaded guilty to the offense of Financial Transaction Card Theft (two counts), and he was sentenced to two year's confinement on each count to be served concurrently with a further order that the sentences be served on probation.

Section 101(a)(43)(G) of the Act, 8 U.S.C. 1101(a)(43)(G), provides that the term "aggravated felony" means a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment (is) at least 1 year.

Section 238(b) of the Act, 8 U.S.C. 1228(b), provides for the removal of aliens who are not permanent residents and provides that:

The Attorney General may determine their deportability under § 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227 (relating to conviction of an aggravated felon) and issue an order of removal pursuant to the procedures set forth in this subsection or § 240 of the Act, 8 U.S.C. 1229.

Although the applicant is deportable and may be removed from the United States, that process under either § 238(b) or § 240 of the Act does not hinder any progress in the matter at hand. Once the applicant has been removed, he will also require permission to reapply for admission in another proceeding.

Section 212(i) of the Act provides that a waiver of the bar to admission resulting from § 212(a)(6)(C) of the Act is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Although extreme hardship is a requirement for § 212(i) relief, once established, it is but one favorable discretionary factor to be considered. See Matter of Mendez, Interim Decision 3272 (BIA 1996).

In Matter of Cervantes-Gonzalez, Interim Decision 3380 (BIA 1999), the Board of Immigration Appeals (BIA) stipulated that the factors deemed relevant in determining whether an alien has established extreme hardship pursuant to § 212(i) of the Act include, but are not limited to, the following: the presence of a lawful permanent resident or United States citizen family ties to this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and, finally significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. The assertions of hardship and other problems are unsupported in the record. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether or not he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under § 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Here, the applicant has not met that burden. Since the applicant has failed to establish his eligibility for the granting of a waiver under § 212(i) of the Act, the appeal regarding the waiver under § 212(h) of the Act must also be dismissed as the applicant is not otherwise admissible. Accordingly, the decision of the district director will be affirmed.

ORDER: The appeal is dismissed.